UNITED STATES
v.
RENA BETH LEDERER & ESTATE OF OLETHA M. BARR

IBLA 95-479 Decided April 28, 1998

Appeal from a decision of Administrative Law Judge Harvey C. Sweitzer declaring four placer mining claims null and void for lack of a discovery. Contest No. Colorado 755.

Affirmed; Decision adopted as modified.

1. Mining Claims: Contests--Mining Claims: Determination of Validity--Mining Claims: Discovery: Generally-- Mining Claims: Discovery: Marketability--Mining Claims: Placer Claims--Mining Claims: Specific Mineral(s) Involved: Clay

An administrative law judge properly declares placer mining claims located for clay null and void when the claimants did not overcome, by a preponderance of the evidence, the Government's prima facie case that none of the claims contains the discovery of a valuable mineral deposit.

APPEARANCES: Don H. Sherwood, Esq., Denver, Colorado, James L. and Frances I. (Barr) August, Boulder, Colorado, and Philip D. and Irene E. (Lederer) Rood, Boulder, Colorado, for Rena Beth Lederer and the Estate of Oletha M. Barr; Daniel B. Rosenbluth, Esq., Office of the General Counsel, U.S. Department of Agriculture, Golden, Colorado, for the Bureau of Land Management.

OPINION BY ADMINISTRATIVE JUDGE KELLY

Rena Beth Lederer and the Estate of Oletha M. Barr (Appellants) have appealed from an April 28, 1995, Decision of Administrative Law Judge Harvey C. Sweitzer, declaring the Wheeler Nos. 1 through 4 placer mining claims, CMC-130620 through CMC-130623, null and void because they failed to establish the discovery of a valuable mineral deposit on any of the claims.

The claims are situated on 80 acres of land in unsurveyed secs. 14 and 15, T. 1 N., R. 74 W., Sixth Principal Meridian, Grand County, Colorado, in a remote section of the Arapaho National Forest known as Wheeler Basin. They were originally located on August 15, 1932, by Alfred T. Wheeler and three other members of his family. Lederer and Barr, descendants of the

Wheelers, succeeded to their interests in the claims. Upon Barr's death on February 26, 1987, her interest in the claims passed to her Estate.

A contest complaint was filed by the Bureau of Land Management on behalf of the Forest Service, U.S. Department of Agriculture, on November 5, 1992, charging that the claims were not valid because no valuable mineral deposit had been discovered within the boundaries of any of the claims, the claimed land was not mineral in character, and the claims were not being held in good faith for mining purposes. The case was assigned to Judge Sweitzer, who conducted a hearing over the course of 5 days between June 16 and October 27, 1994, in Denver, Colorado.

In his April 1995 Decision, Judge Sweitzer concluded that the contention that the claims were not being held in good faith for mining purposes "is not supported by the record." (Decision at 5.) However, he also concluded that the Government had established a prima facie case that a valuable mineral deposit had not been discovered within the boundaries of each of the four placer mining claims, either on the date of withdrawal or at the time of the hearing, and that Appellants had failed to rebut that case by a preponderance of the evidence. Thus, Judge Sweitzer declared the claims null and void. Appellants appealed from that Decision. The Government did not appeal Judge Sweitzer's ruling on the good faith issue.

At the hearing, the Government mineral examiner testified that the land embracing the claims had been withdrawn from location under the mining laws on December 22, 1980. (Tr. I 93.) In his Mineral Report, dated July 31, 1992, he stated at page 3 that "[t]he Indian Peaks Wilderness Area was created on December 22, 1980 by Public Law 96-560 and encompasses the subject mining claims." In his Decision, Judge Sweitzer relied on the mineral examiner's representation that the land in question had been withdrawn on December 22, 1980. However, while the claims in question are within that wilderness area, the December 22, 1980, date is incorrect.

Congress created the Indian Peaks Wilderness Area on October 11, 1978, Pub. L. No. 95-450, 92 Stat. 1095. However, under section 4(d)(3) of the Wilderness Act of 1964, 16 U.S.C. § 1133(d)(3) (1994), the land within that wilderness area was not withdrawn from appropriation under the mining laws until January 1, 1984. Nevertheless, utilizing January 1, 1984, as the correct date for withdrawal does not benefit Appellants. We have reviewed the evidence in the case record and conclude that it fails to establish the discovery of a valuable mineral deposit at any relevant time.

By Order dated July 18, 1995, we granted Appellants' petition to stay the effect of Judge Sweitzer's April 1995 Decision, pending the Board's final resolution of their appeal.

On appeal, Appellants amplify the arguments raised before Judge Sweitzer. They again assert that the Wheeler clay is an "extraordinary" material. (Statement of Reasons (SOR) at 5.) They state, however, that the "high quality Wheeler clay is concentrated in about 2 acres (TR II at 194) so a very minimum area is involved." (SOR at 11.) Since Appellants' arguments are directed to the high quality clay, which is located on the Wheeler No. 2 claim, they, in essence, admit the lack of discovery

of a valuable mineral deposit on the other three claims. Appellants contend that there are 1,748 tons of high quality clay available, that the clay is worth $12,000 per ton wholesale, and that the value of the deposit is "over $20,000,000." (SOR at 6.) The costs of production, they assert, are only $2,940 per ton "maximum." (SOR at 8.)

Despite these contentions by Appellants, the reality of the situation is that Appellants and their predecessors in interest have held the claims in question for over 50 years, yet the only evidence of the sale of clay from the claims was the sale of 11 pounds from the Wheeler No. 2 between June and October 1994. The evidence, as a whole, shows that Appellants' assertion of the discovery of a valuable mineral deposit is based on conjecture as to the quantity of the clay, the costs of production, and the market for the material. If, in fact, this deposit were as valuable as Appellants assert, one would assume a greater effort would have been made to market it. Appellants have failed to show that clay from the Wheeler No. 2 claim can be mined, removed, and marketed at a profit.

We reject Appellants' assertion that Judge Sweitzer did not look at any of the briefs presented to him. At page 1 of his Decision, Judge Sweitzer specifically stated that his conclusion was based on the fact that he had "reviewed and considered all evidence and briefs." Appellants offer no evidence to contradict his statement. The mere fact that Judge Sweitzer made no specific references to the briefs in his Decision does not establish that he failed to consider them.

Further, after a thorough review of the record in this case, including all arguments made by Appellants and the Forest Service, we agree with Judge Sweitzer's findings and conclusions, except to the extent discussed above regarding the date of withdrawal. His Decision sets forth a complete summary of the relevant testimony and evidence, and discusses the applicable law. Therefore, we adopt Judge Sweitzer's Decision, as modified, as our own and attach a copy hereto. See United States v. Conner, 139 IBLA 361, 363 (1997).

To the extent not addressed herein, all other arguments raised by Appellants have been considered and rejected.

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 C.F.R. § 4.1, the Decision appealed from is affirmed as modified and adopted.

_____
John H. Kelly
Administrative Judge

I concur:

_____
Bruce R. Harris
Deputy Chief Administrative Judge

United States Department ot the Interior

OFFICE OF HEARINGS AND APPEALS

Hearings Division
6432 Federal Building
Salt Lake City, Utah 84138
Phone: 801 524 5344)

April 28, 1995

UNITED STATES OF AMERICA	: Colorado 755
	:
Contestant :	Involving the Wheeler Nos. I
	: through 4 Placer Mining Claims,
v. :	located Within Sections 14 and
	: 15, Unsurveyed T. 1 N.R. 74 W.,
RENA BETH LEDERER	: 6th Principal Meridian. Grand
OLETHA BARR :	County, Colorado. within the : Arapaho National Forest
Contestees	:

DECISION

Appearances: Daniel B. Rosenbluth. Esq.. Denver. Colorado. for contestant:

Don H. Sherwood. Esq. Denver, Colorado. for contestees.

Before: Administrative Law Judge Sweitzer

The Bureau of Land Management (BLM). United States Department of the Interior. at the behest of the U.S. Forest Service. filed a complaint charging that the Wheeler Nos. I through 4 placer mining, claims are null and void because (1) no valuable mineral deposit has been discovered within the boundaries of the mining claims, (2) the land within the boundaries of the mining claims is nonmineral in character, and (3) the claims are not being held in good faith for the purpose of mining, milling, or developing a valuable mineral.

Hearings in the matter were held in Denver, Colorado, on June 16 and 17, 1994 (hereinafter referred to as "Tr 1"), and on September 20, October 26. and October 27. 1994 (hereinafter referred to as "Tr. II). The parties filed post-hearing briefs in support of their respective positions. Having reviewed and considered all evidence and briefs, and for the reasons set forth below, I must conclude that the Wheeler Nos. I through 4 placer claims are void for failure to discover a valuable mineral deposit.

*

Statement ot Facts

The Wheeler Nos. I through 4~ placer mining claims are located within the Indian Peaks Wilderness Area in an area known as Wheeler Basin (Ex. 3 at 2). This area was withdrawn and closed to location under the mining laws on December 22, 1980.

The claims are found at an elevation ranging from approximately 10.600 to 11,000 feet above sea level (Ex. 3 at 3). The distance from the nearest road to the claims is approximately 12 miles through very difficult terrain (Tr I at 34, 92-93). A small stream heads up in Wheeler Basin and flows northwesterly through the claims (Tr. 11 at 62: Ex 3 at 3). The valley or meadow containing the claims is very moist due to the abundance of water in the stream (Tr. II at 42).

The claims were located on August 15. 1932. by A.T. Wheeler, L. Irene Wheeler, R.B. Wheeler, and O.M. Wheeler (Ex.3 3 at 2). A cabin built by A.T. Wheeler more than 60 years ago is located on claim No. 4 (Ex. 3 at 2).

The named contestees are sisters and successors to the original locators. Contestee Oletha Barr is now deceased and her successor-in-interest is Francis August (Tr. I at 4-5). Mrs. August and her husband, James August, were designated to represent contestee Rena Beth Lederer's interests. as well as Mrs. August's own interests because Mrs. Lederer is incapacitated (Tr. I at 6-8; Tr. II at 33. 110-111).

At the hearing, the Augusts asserted that the claims were valid because they contained a valuable deposit of clay referred to as "Wheeler clay." The Wheeler clay purported has several medicinal purposes, such as a cure for acne, skin cancer. ulcers. and tapeworm (Tr. II. at 42). However. its primary economic value, according to the evidence, lies in its potential for use in facial masks, as evidence of its economic value for other purposes was not presented.

Both Mrs. August and her cousin, Irene Rood, the daughter of contestee Oletha Barr, testified that they began visiting the claims as young children in the company of contestees, with Mrs. August's visits dating back to 1954 (Tr. II at 36, 113-114). During their visits, holes or pits were dug on the claims to recover the clay (Tr. II at 36-38, 41, 113-116, 119).

Mr. August first visited the claims in 1965 and found 15 or 20 existing pits scattered throughout the claims (Tr. II at 160-162, 178). Every year from 1965 to approximately 1983, Mr. August took clay out of existing pits or newly dug pits from points throughout the claims (Tr. II at 165-168, 171, 178). In doing so. his purpose was to locate the areas containing high quality clay. i.e., Wheeler clay (Tr. II at 166, 179). He determined that the high quality (Wheeler) clay was located on claim No. 2 and that the clay found on the other claims was of lesser quality (Tr. 173, 179-182).

From approximately 1983 onward, clay was brought out from the claims every year by either Mr or Mrs. August or Mrs. Rood and her husband Philip Rood (hereinafter collectively referred to as "contestees' heirs") (Tr. II al 171, 185). Each couple dug for clay on the claims 1 out of every 2 years so that they dug in alternating years (id.).

Mr. Rood explained the process of mining the clay as summarized below. The contestees' heirs would spend the first day traveling to the claim on horseback, unpacking, and preparing materials at the cabin (Tr. II at 82). The second day would be spent doing trail work on the 5 miles of trail not maintained by the Government between the Arapaho trail and the claim (Tr. II at 83). Part of the third day would be spent at the claims emptying water from the preexisting pits that had filled up with water and then removing the "muck." (Tr. II at 83)

The pits were about 4 feet deep and would fill up with water in the wet meadow (Ex. 3 at 5: Tr. I at 105-106). The remainder ot the third day would be spent exposing the clay, removing it, and packaging it for transport (Tr. ll at 84). The contestees' heirs would generally use existing pits and would scrape off layers ot earth until they reached the layer of clay (Tr. II at 60-61). The contestees' heirs used tools such as a putty knife to carefully remove the best clay so as not to contaminate it with dirt or lesser quality clay (Tr. II at 62). The fourth day would be spent doing reclamation work required by the U.S. Forest Service (Tr. 11 at 84). On the fifth day, the contestees' heirs would pack up all of the equipment in the cabin and prepare to leave the claims (Tr. II at 83-84). Contestees would have arranged for the appropriate number of horses needed to carry people and clay back to the trail head (Tr. II at 84).

Mr. August testified that one person working alone could mine and remove about 18 tons of Wheeler clay per year, although the largest amount that he had ever brought out in I year is 1,000 pounds (Tr. II at 222-93). Mr. August further testified that yearly production would probably be in the area of 10 to 20 tons per year and probably not more than 100 tons (Tr. II at 228).

He also estimated that, at a sales rate of 18 tons per year and a sale price of $6 per pound, the annual gross receipts for the Wheeler clay would be $216.000 (Tr. II at 279). With estimated costs being two-thirds of revenues, he opined that there would be an annual profit of $71.000 (Tr. II at 279-80). He did concede, however, that the contestees' heirs have quite a little bit of ground to cover to get into a profit mode, and that they have not expected the business thus far to be in a profit mode (Tr. II at 254).

Mr. Rood similarly admitted that the contestees' heirs have not made money on the enterprise (Tr. II at 85). The only sales evidence presented by the contestees' heirs were receipts for three separate sales between June and October 1994 (Tr. II at 291-93: Exs. B-D. ~'-P). They sold 11 pounds of Wheeler clay at $6 per pound for a total of $66 in revenue (Tr. II at 291-293: Exs. B-D, N-P). Mr. Rood conceded that the contestees' heirs costs or mining the claims exceeded their revenues (Tr. II at 93). He further

conceded that those costs included labor costs because the contestees' heirs have always mined the claims by themselves and they have not paid themselves a wage (Tr. II at 90, 93-94, 239).

Mr. Holmes, contestees' principal expert witness, who has 36 years experience in mineral exploration and production, testified that he believed the Wheeler clay could be sold on a national basis and likely on a world-wide basis (Tr II at 344, 399). He estimated that the wholesale price for the Wheeler clay would be anywhere from $2 to $6 per pound (Tr. II at 400).

He later explained that the Wheeler clay was similar to other clays used in facial mask products, that an established market existed for those products, and that the Wheeler clay would be marketed as a facial mask product (Tr. II at 425-97. 445-47). He described the market as including hundreds or thousands of producers, most of whom are small in size and have developed small market niches (Tr. II at 429-30. 445-47). He further described it as a high priced markets where the desirability or quality of a product, and not price, drives the market (Tr. II at 429-30). Within a wide range, price can be manipulated to cover production costs, provided that a product is "a desirable product * * * for unique reasons." i.e., that a market niche can be developed for the product (Tr. II at 429-30, 445-47).

Significantly, Mr. Holmes conceded that the desirability of facial mask products comprised of Wheeler clay could only be determined upon actual use or trial use of the products (Tr. II at 436). He nevertheless concluded that the Wheeler clay could be successfully marketed based, in part, upon the fact that the contestees' heirs had been successful in selling 11 pounds of the Wheeler clay and that the buyer had expressed an interest in purchasing more (Tr. II at 410).

Mr. Holmes estimated that it would cost $100 to $150 per ton to get the Wheeler clay out of the ground and down to the bottom of the mountain (Tr. II at 402). The cost of processing the Wheeler clay would be about $100 to $500 per ton as a general estimate (Tr. II at 403. 427). This estimate did not include any costs associated with restrictions placed on mining in Wilderness Areas, because Mr. Holmes had not worked with mining operations in Wilderness Areas and was not familiar with the wilderness restrictions placed on mining operations (Tr. II at 421). Mr. Holmes concluded that the profit on the Wheeler clay would be about $1 to $4 per pound (Tr. II at 404).

Mr. Holmes conceded that he had not visited the claims or verified the reserves of Wheeler clay, which Mr. August estimated to be 1.728 tons (Tr. II at 194-96. 411-12: Ex. K). These estimated reserves, shown on Exhibit K, lie solely within claim No. 2 (Tr. 188-190). It is unclear exactly how- Mr. August determined the extent of the reserve area, although it obviously encompasses the creek. as well as many pits from which Wheeler clay had been removed (Tr. II at 194-196; Ex. K). Upon reviewing Exhibit K. Mr. Holmes could give no assurances that the clay deposit was continuous between the many pits (Tr. 412-414).

George Finnell, an Indian Peaks Wilderness Ranger for the U.S. Forest Service, testified that he had only seen contestees' heirs at the claims site once in the 8 years he had visited the site (Tr. I at 41). This testimony is not inconsistent with the testimony ot contestees' heirs that they generally worked on the claims site no more than I week each year (Tr. II at 272).

Mr. Mullin, a certified mineral examiner, prepared the Mineral Report for the contestant (Ex. 3). He examined the claims in July 1985, accompanied by Mr. and Mrs. August (Tr. I at 90). At the time of the mineral examination. he found 15 to 20 old prospect pits scattered throughout claim Nos. 2 and 4 (Tr. I at 110: Ex. 3 at 5). The pits on claim No. 4 were very old (Ex. 3 at 5). Most of these old pits were approximately 4 feet square although a few were much larger (Tr. I at 110; Tr. II at 40; Ex. 3 at 5). All ot these pits were full of water, and grass and weeds were present in many of them (Tr. I at 105; Ex. 3 at 5). Mr. Mullin found no pits or evidence of past work on claim Nos. I and 3 (Ex. 3 at 5: Tr. I at I 10).

Mr. August excavated two new prospect holes from which Mr. Mullin recovered two samples (Tr. I at 105; Ex. 3 at 5). The first sample was taken from a 4-inch seam ot clayey material and weighed approximately 5 pounds (Tr. I at 105;: Ex. 3 at 5). The second sample weighed approximately 3 pounds and was taken from a 14-inch seam of fine black sand and gravel (Tr. I at 105; Ex. 3 at a). These samples remained in Mr. Mullin's custody until they were turned over to Skyline Labs, Inc., in Wheat Ridge, Colorado, for assaying (Ex. 3 at 5).

Mr. August also submitted a sample of the Wheeler clay for assay (Tr. II at 303-305; Exs. R-X). The assay results from both Mr. August's sample and the samples submitted by Mr. Mullin show that the Wheeler clay is composed of about 70 percent smectite, 20 percent kaolinite, and 10 percent illite (Exs. R. S. and T).

Mr. Mullin concluded that contestees had not made a discovery of valuable mineral deposit within the limits of the mining claims (Tr. I at 110, 125-27, 129). This conclusion was based on the facts that he had not been able to find any evidence of production or sales of clay, that the costs of mining and transporting the clay were prohibitive, and that there appeared to be no market for the clay.

Discussion

I.

Did contestees hold the claims in good faith for the purpose of mining or developing a valuable mineral.

Although contestant contends that the claims were being held in bad faith, this contention is not supported by the record. The contestees brought forth sufficient evidence to

overcome assertions that the were being held in bad faith. Mr. Rood (and others) testified convincingly that the visits to the claims were primarily for mining purposes (Tr II at 73-74).

The one time that Mr. Finnell saw contestees' heirs at the claims site, they were actively digging in the meadow (Tr. at 41). This evidence is inconsistent with the contention that the claim was held in bad faith. In sum, contestees have held the claims in good faith for the purpose of mining or developing a valuable mineral.

II.

Was a prima facie case established as to lack of discovery of a valuable mineral deposit?

When the Government contests the validity of a mining claim, it bears only the burden of going forward with sufficient evidence to establish a prima facie case. Once a prima facie case is presented, the claimant must present evidence which preponderates sufficiently to overcome the Government's case on those issues raised. United States v. Eva M. Pool et al., 78 IBLA 215. 220 (1984).

In this case, a prima facie case was established that each of the subject claims is invalid for failure to discover a valuable mineral deposit. The discovery of a valuable mineral deposit is a prerequisite to a mining claim being found valid. 30 U.S.C. § 22 et seq.; United States v. Burt, 43 IBLA 363, 366 (1979). With respect to the land which has been withdrawn from mineral entry, a discovery of a valuable mineral deposit must exist at the date of withdrawal and at the date of hearing. United States v. Weber Oil Co.. 89 I.D. 538 (1982).

The standard utilized to determine whether a discovery of a valuable mineral deposit has been made is the "prudent man" test. United States v. Coleman, 390 U.S. 599 (1968). Accordingly. there must be found within the limits of the contested mining claims mineral of such quality and quantity as to justify a person of ordinary prudence in the further expenditure of his labor and means with a reasonable prospect of success in developing a paying mine. Converse v. Udall, 399 F.2d 616 (9th Cir. 1968). cert. denied. 393 U.S. 1025 (1969); United States v. Edline, 39 IBLA 236, 238 (1979). This "prudent man" test "has been refined to require a showing that the claimed mineral is capable of extraction, removal and marketing at a profit, the so-called "marketability test." United States v. Hooker et. al., 48 IBLA 22, 28-29 (1980).

A prima facie case was established by the testimony and mineral report of Mr. Mullin, a certified mineral examiner, in which he concluded that no discovery of a valuable mineral deposit had been made. See United States v. Bruce Gillette et al., 104 IBLA 269, 274-275 (1988). He took samples of material found on the Wheeler claims and, following an assay, determined that the Wheeler clay had very little economic value (Ex. 3). He also testified

that the cost o! extracting, removing and transporting the material would outweigh, any revenue received by selling the clay (Ex. 3. Tr. I at 120-24).

In addition, Mr. Mullin could not find, nor did contestees provide him, any evince to show that any production or sales of Wheeler clay had been accomplished prior to the preparation ot the mineral report (Tr. I at 110. 129). In fact, on claim Nos. I and 3. he found no evidence of past work of any kind, either of a prospecting nature or production nature. Failure to engage in productive extraction of minerals over a sustained period ot years "is, of itself. adequate to constitute a prima facie case ot the claim's invalidity." United States v. Rosenberg, 71 IBLA 195. 200 (1983).

III.

Did contestees overcome contestant's prima facie case by showing that a discovery of a valuable mineral deposit was made?

Where, as here, a presumption is raised that claimants have failed to discover a valuable mineral deposit because there has been little or no development or operations on the claims over a long term, this presumption can be overcome by evidence that the deposit can be mined, removed and marketed at a profit. United States v. Kaycee Bentonite Corp. et al., 89 I.D. 262. 282 (1982). In this case, the evidence does not support a conclusion that the Wheeler clay can be mined, removed, and marketed at a profit.

In general, the evidence presented by contestees' heirs was not sufficiently consistent, meaningful, or substantial to overcome the Government s prima facie case. The general theme throughout the testimony of the witnesses who have actively participated in the prospecting of the claims is that mining the claims, or any of them, was a very rigorous, difficult, and time consuming process with no likelihood of a profit being realized any time in the foreseeable future (see e.g. Tr. II at 254). Contestees' heirs testified that they had been trying to develop a market for the clay for years and had only sold 11 pounds at a very late date, between June and October 1994 (Tr. II at 87. 236. 291-93).

All of contestees projected sales and cost figures were primarily based upon speculation and can be given very little weight. Mr. August testified that by selling 18 tons of clay per year at $6 per pound, with expenses being two-thirds of revenue, the annual profit on the operation would be $71.000. However. it is clear from the testimony of Mr. Holmes and contestees' heirs that future sales of the clay are largely speculative.

Mr. Holmes testified that a world-wide market exists for products similar to the Wheeler clay and the price per pound for these products is relatively high. However. to establish a valid discovery, contestees must be able to show that "the material on [the Wheeler claims]. not some other claim, can be mined, removed, and marketed at a profit." Kaycee Bentonite, 89 I.D. at 284.

Mr. Holmes was encouraged and influenced by the recent small sale of 11 pounds of clay. However, "the Department has long held that the sale of minor quantities ot material * * * does not demonstrate the existence of a market for the material found on a particular mining claim which would induce a man ot ordinary prudence to expend his labor and means in an attempt to develop a valuable mine on that claim." United States v. Herb Penrose, 10 IBLA 332, 334 (1973). Contestees testified that despite years of marketing efforts. they had no contracts or other agreements to sell any more of the Wheeler clay (Tr. II at 138).

Most importantly, Mr. Holmes conceded that actual use of the Wheeler clay in Facial masks would be necessary to determine whether a market could be developed for the clay. In sum, contestees failed to prove that there is a market for the Wheeler clay.

Furthermore. contestees presented no concrete evidence as to what their costs have been or would be to mine the claims. Mr. Holmes testified that he had only used a general cost figure to determine profitability at this point in his analysis. The fact that it was only a general cost estimate did not concern him because the "market [price] is so high that it can absorb a lot of those small [costl differences, if any," between his general cost estimate and the actual costs (Tr. II at 449). Because Mr. Holmes cost estimate is unsupported by specific or realistic cost data, it is inherently unreliable and of little probative weight. United States v. Gillette, 104 IBLA 269. 275 (1987). Moreover, Mr. Holmes admitted that he had not visited the claims themselves, nor was he familiar with Wilderness Area requirements. "Testimony made in admitted ignorance of the physical status of the land * * * is entitled to no weight." United Stales v. Hess, 46 IBLA 1. 7 (1980). In conclusion, contestees failed to overcome the prima facie case that the Wheeler clay, even if marketable, could not be sold for a price that would cover their costs.

Even less convincing are the assertions that the Wheeler clay could have been mined, removed, and marketed at a profit as of December 22. 1980, when the claim site was withdrawn from discovery under the mining laws. Mr. Holmes offered little evidence to show that there was a valid discovery at the time of withdrawal. He testified that one particular contract company located in Arizona, which processes clay for a fee, but does not purchase it, has been in business since 1972, and that the use of facial mud packs has stayed fairly constant since then (Tr. II at 406-408). This evidence is wholly inadequate to show the existence of a valuable discovery on the date of withdrawal.

Another crucial point is that contestees identified no reserves of the Wheeler Clay on claim Nos. 1. 3. or 4. The only significant amount of the high quality (Wheeler) clay is located on claim No. 2. This fact alone establishes the lack of a valid discovery on claim Nos. 1, 3. and 4.

Assuming the Wheeler clay reserves on claim No. 2 are as large as Mr. August believes, contestees have failed to provide sufficient evidence of mining costs or a market for the clay to show that there is. or was on the date of withdrawal, a reasonable prospect of

mining and marketing this clay at a profit. Therefore. all of the subject mining claims must be declared null and void for failure to establish the existence of a valuable mineral deposit.

Conclusion

Based upon the foregoing, the subject mining claims are hereby declared null and void.

Harvey C. Sweitzer
Administrative Law Judge

APPEAL INFORMATION

Any party adversely affected by this decision has the right to appeal to the Interior Board of Land Appeals. The appeal must comply strictly with the regulations in 43 CFR Part 4 (see enclosed information pertaining to appeals procedures.)

Distribution
By Certified Mail:

Daniel B. Rosenbluth. Esq.
Office of the General Counsel
U.S. Department of Agriculture
P.O. Box 25005
Denver. Colorado 80225-0005
(two copies)

Don Sherwood, Esq.
1801 California Street, Suite 3600
Denver, Colorado 80202
(two copies)